



APPENDIX

Order Approving Sheriff's Sale of Real Estate

(RECORD, PAGE 25)

Now, on this 9th day of September, 1938, the same being a regular judicial day of the court, comes on for hearing the motion of plaintiff to confirm the sale of real estate made by the Sheriff of this County and State on the 19th day of August, 1938, under an Order of Sale issued out of the office of the Clerk of this Court, said sale being of the following described real estate, to-wit:

Lot Sixteen (16), in Block Six (6), Sunset Terrace, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

and the objection of defendants, Bertha Florence Sabin and M. R. Sabin, appearing by his attorney, Bertha Florence Sabin, and the defendant, Bertha Florence Sabin, appearing in person and as her own attorney, and both sides having announced ready, the matter having been fully presented and the Court being fully advised in the premises, finds that the objection to the confirmation of said sale should be overruled, and the Court having examined the proceedings of said Sheriff under said sale, including his return thereof, FINDS, that the same are regular and have in all things been performed in conformity with law and the orders of this Court,

and the Clerk is directed to make an entry on the Journal that the Court is satisfied of the legality of said sale.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the objections to the confirmation of said sale herein be, and the same are hereby overruled, to which the defendants, Bertha Florence Sabin and M. R. Sabin, and each of them, except, and said exceptions are hereby allowed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court, that said sale, and all of the proceedings herein be, and the same are in all respects confirmed and approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court, that the Sheriff of this County be, and he hereby is, directed to make and execute to the purchaser at said sale a good and sufficient deed for the premises so sold, and that a Writ of Assistance issue out of the office of the Clerk of this Court to the Sheriff of said County, directing him to put the purchaser in possession of the said premises, and each and every part thereof.

To all of which the defendants, Bertha Florence Sabin and M. R. Sabin, and each of them, except, and give notice in open Court of their intention to appeal to the Supreme Court of the State of Oklahoma.

IT IS THEREFORE ORDERED, that said defendants be, and they are hereby given thirty (30) days from date within which to prepare and serve case-made upon plaintiff, herein, said plaintiff to be given ten (10) days thereafter to suggest

amendments, same to be settled and signed upon five (5) days notice.

IT IS FURTHER ORDERED, that said defendants are given twenty (20) days from date within which to file a supersedeas bond herein, in the sum of Sixty-Five Hundred (\$6,500.00) Dollars.

(Signed) PRENTISS E. ROWE, Judge.

Filed: In District Court of Tulsa County, Oklahoma,

September 16, 1938.

Oklahoma Statutes, 1931

456. CONFIRMATION OF SALE—PAYMENT OF MONEY TO PERSON ENTITLED.

If the court, upon the return of any writ of execution, for the satisfaction of which any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tenements; and the officer, on making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court.

**457. SHERIFF'S DEED—TITLE VESTED IN PURCHASER—
NECESSARY RECITALS.**

The sheriff or other officer who upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser as good and sufficient deed of conveyance of the land sold, as the person or persons against whom such writ or writs of execution were issued could have made of the same, at or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfaction of the judgment; and such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid, and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases.

**543. PROCEEDINGS IN ERROR NOT TO STAY EXECUTION
UNLESS UNDERTAKING EXECUTED.**

No proceeding to reverse, vacate or modify any judgment or final order rendered in the county, superior or district court, except as provided in the next section, and the fourth

subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error, to the adverse party, with one or more sufficient sureties, as follows:

* * * * *

THIRD. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by the court or the judge thereof, to the effect that during the possession of such property by the plaintiff in error, he will not commit, or suffer to be committed, any waste thereon, and if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency.

546. UNDERTAKING TO STAY EXECUTION—EXTENSION OF TIME TO MAKE CASE—JUDGMENT IN APPELLATE COURT AGAINST SURETIES.

Before an undertaking shall operate to stay execution of a judgment or order, a petition in error must be filed in the appellate court and the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the judge or clerk thereof; provided, that at any time when the

time for making or completing a case-made is extended by the court or judge, the court or judge shall include in such order an order staying execution pending the giving of an undertaking as herein provided for and the time within which the proceedings in error shall be filed in the Supreme Court, in order to continue such stay of execution pending the completion and settling of the case and the filing of the petition in error in the Supreme Court, and in the event the judgment of the court to which such appeal is taken is against the appellant, judgment shall, at the same time it is entered against the appellant, be entered against the sureties on his said undertaking to stay execution, and execution shall issue thereon against said sureties the same as against their principal, the appellant, and no stay of such execution shall be permitted.



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 952

BERTHA FLORENCE SABIN AND M. R. SABIN,
PETITIONERS

v.

HOME OWNERS' LOAN CORPORATION, GEORGE J.
OVERMYER AND BRENDA E. OVERMYER

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT*

**MEMORANDUM FOR THE HOME OWNERS' LOAN
CORPORATION IN OPPOSITION**

This is the fourth occasion on which this Court has been asked by the petitioners to grant a writ of certiorari to review the litigation growing out of proceedings, brought by the Home Owners' Loan Corporation, to foreclose a mortgage securing a note made by petitioners. Petitioners' previous attempts to secure review by this Court have been fruitless. See 313 U. S.

570, rehearing denied, 313 U. S. 601; 315 U. S. 800, rehearing denied, 315 U. S. 829, second petitions for rehearing denied, 316 U. S. 713; No. 269, this Term, certiorari denied, October 22, 1945, petition for rehearing and supplement denied, January 28, 1946.¹

Petitioners instituted this suit in the District Court of the United States for the Northern District of Oklahoma on November 10, 1943 (R. 2), and sought a judgment restoring to them the possession of, and quieting the title to, the property which was the subject of the foreclosure action above-mentioned. The Home Owners' Loan Corporation was originally named as the sole defendant (R. 3) but, after a motion to dismiss was filed (R. 170), George J. Overmyer and Brenda E. Overmyer, who purchased the property from the H. O. L. C. on August 26, 1941, and are the present owners of record, were joined as parties defendant (R. 170, 172-173).

The district court granted respondents' motions for summary judgment (R. 124, 175, 209) and the circuit court of appeals affirmed (R. 220; 151 F. 2d 541). A petition for rehearing was denied by the court below on November 28, 1945 (R. 230).

Two of the questions presented by petitioners (Pet. 14; see particularly Pet. 23) are precisely

¹ Previous opinions arising out of earlier and related phases of this litigation are reported in 147 F. 2d 658, and 187 Okla. 504.

the same as those urged in their petition for a writ of certiorari, filed earlier this Term, No. 269. We respectfully refer this Court to our brief in opposition, filed in that case, in which the facts out of which these cases arose are more fully detailed and in which we explain our view (1) that the sheriff's deed to the H. O. L. C., issued after confirmation of the foreclosure sale by the District Court of Tulsa County, Oklahoma, is not subject to collateral attack on the ground that it was delivered at a time when the execution of the order of confirmation had been stayed (No. 269, Br. in Opp. 6-7), and (2) that the District Court of Tulsa County was not divested of jurisdiction to issue the alias writ of assistance, pursuant to which the H. O. L. C. was put in possession, by reason of the pendency, in the Supreme Court of Oklahoma, of a petition to recall the mandate of affirmance issued by that court (No. 269, Br. in Opp. 7-8).

Petitioners now collaterally attack the judgment of foreclosure, entered by the Oklahoma trial court on January 10, 1938 (R. 129-131), and affirmed by the Oklahoma Supreme Court on May 28, 1940 (*Sabin v. Home Owners' Loan Corporation*, 187 Okla. 504, rehearing denied on July 16, 1940, certiorari denied, 313 U. S. 570, rehearing denied, 313 U. S. 601), on the grounds (1) that they "have never, however much they have tried, been allowed to present their proof" (Pet. 52) as to an alleged "extension agreement" between peti-

tioners and the H. O. L. C., an agreement which, it is said, was a "defense to the foreclosure action" (Pet. 47); (2) that the judge who tried the foreclosure action was "disqualified and was overreached by said H. O. L. C." (Pet. 52) because he was, himself, a debtor in default to the H. O. L. C.; and (3) that "one of the members of the Supreme Court [of Oklahoma] who participated in the decision of this case on appeal was disqualified" (Pet. 59) because he "was employed by said H. O. L. C. from 1933 until he was elevated to the Supreme Court bench in 1937, as an attorney and loan-closer" (R. 18). Petitioners contend that one or more of these questions raise "issues as to material facts" and that summary judgment was not justified, at least not if rendered for the respondents (Pet. 48).

1. In *Sabin v. Home Owners' Loan Corporation*, 187 Okla. 504, 506, the Supreme Court of Oklahoma held that "there was not a sufficient consideration passing from defendants to plaintiff to support the alleged extension agreement". Whatever its merits, this decision is *res judicata* as between the parties to that case and their privies, and therefore forecloses consideration, in this proceeding, of the defense based on the alleged extension agreement. *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 626; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 402-403, and cases cited; *Fischer v. Pauline Oil Co.*, 309 U. S. 294, 303. It is plain, moreover, that a summary judgment may be

grounded on *res judicata*. *Schwartz v. Levine & Malin, Inc.*, 111 F. 2d 81 (C. C. A. 2); *E. I. DuPont De Nemours & Co. v. Sylvania Industrial Corporation*, 122 F. 2d 400 (C. C. A. 4); *A. B. C. Fire-proof Warehouse Co. v. Atchison, T. & S. F. Ry. Co.*, 122 F. 2d 657 (C. C. A. 8); see Moore, *Federal Practice*, p. 3182, note 3.

2. The court below properly held (R. 222) that petitioners' "statement that the trial judge was overreached is a mere conclusion and not a statement of fact," and that "This assignment of error does not merit any serious consideration or extended discussion." In none of petitioners' many pleadings, affidavits, and exhibits, is fraud alleged with the necessary particularity. *United States v. Atherton*, 102 U. S. 372; *Kithcart v. Metropolitan Life Insurance Co.*, 88 F. 2d 407 (C. C. A. 8); *Southwick v. Jones*, 177 Okla. 409.

The circuit court of appeals also ruled that the "charge that the trial judge was disqualified because he had a Home Owners' Loan Corporation mortgage which was in default is too gauzy to present a substantial question" (R. 222). This is borne out by rulings of this Court and of the Oklahoma Supreme Court to the effect that, in order to be disqualified, a judge must have a direct interest in the result of the litigation. *Dugan v. Ohio*, 277 U. S. 61; *Riley v. Carter*, 165 Okla. 262, 286-288. Moreover, the Supreme Court of Oklahoma has held that the disqualification of a judge does not deprive the court of jurisdiction

and that "his judgment is not subject to a collateral attack." *State ex rel. Attorney General v. Davenport*, 125 Okla. 1, 6-7.

3. Much the same considerations serve to dispose of petitioners' claim that a judge of the State Supreme Court was disqualified by virtue of his association, before his ascension to the bench, with the H. O. L. C. In addition to the authorities above cited, it may be noted that this Court as well as the Oklahoma Supreme Court have held that the fact that a judge has been counsel for one of the parties in matters unconnected with the litigation before him is not ground for his disqualification. *Carr v. Fife*, 156 U. S. 494; *Harjo v. Chilcoat*, 146 Okla. 62, 67. Compare *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 416-417.

This Court has thrice refused to respond to petitioners' recurrent and incessant efforts to have the judgment of foreclosure, entered against them eight years ago, set aside. There is no more reason for further review in this case than there has been in any of the others.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

KENNETH G. HEISLER,

General Counsel,

RAY E. DOUGHERTY,

Assistant General Counsel,

Home Owners' Loan Corporation.

APRIL 1946.

